In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-855

RICHARD ERNEST FRITTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court committed plain error by failing to provide an accomplice instruction *sua sponte*. Petitioner also contends that prosecutorial misconduct deprived him of due process.

After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of importation, possession with intent to distribute, and conspiracy to import marijuana into the United States, in violation of 21 U.S.C. 952(a), 960(a)(1), 841(a)(1), and 963. He was sentenced to concurrent terms of 18 months' imprisonment on each count, to be followed by a special three-year parole term. The court of appeals affirmed, one judge dissenting (Pet. App. A-1).

At trial, Alan Jones and James Palmer, petitioner's confederates in the importation scheme, testified that they met with petitioner to discuss smuggling marijuana from Mexico into the United States. At that meeting, they decided to obtain a pickup camper and install in it a false floor where marijuana could be concealed and smuggled through United States customs. Petitioner arranged for the camper rental, contacted a carpenter he knew who could alter the camper body, and supplied approximately half of the $2,000 for the marijuana purchase (Tr. 22-26, 58-65).

Jones and Palmer further testified that, after obtaining the camper from the rental agent and having the false floor installed, they traveled to Mazatlan, Mexico, and purchased between 60 and 80 kilogram packages of marijuana for about $10-$12 a pound (Tr. 24-32, 41, 59-74). Upon reentering the United States, however, customs officials at Nogales, Arizona, discovered the marijuana, except for eight kilogram packages concealed in the door panels.

Petitioner thereafter traveled to Nogales, posted bond for Jones and Palmer, and reclaimed the seized camper. Palmer testified that he and petitioner subsequently removed the door panels beneath the windows and recovered the eight kilogram packages. Petitioner thereupon sold about eight or nine pounds of it (Tr. 77-83).

Charles Martin, the rental agent from whom Jones and Palmer leased the camper, testified that petitioner had asked him to reserve the camper for a "fishing trip" in Mexico and had later advised him that he was ill and that the camper should be rented to his two associates (Tr. 121-124). After customs agents advised Martin that the vehicle had been impounded, petitioner volunteered to recover it. Petitioner returned the camper to Martin but subsequently removed it for about an hour to fix "a window problem." At the time he appeared nervous and in need of sleep (Tr. 124-130).

Customs Inspector Joseph Skaff testified that upon inspecting the camper at the Nogales, Arizona, border station, he found approximately 133 pounds of marijuana in 62 or 63 packages therein (Tr. 146-148).

Harold Willis, an acquaintance of petitioner and Palmer,[1] testified that petitioner had asked him "how he could go about bailing out Palmer without bringing any suspicion on him[self] or any heat on him[self]," and also had told him that he and Palmer had had compartments built into the camper "by a good friend of ours" (Tr. 165-167).

Carroll Johnson, the carpenter who installed the false floor on the camper, testified for the defense that Palmer, rather than petitioner, arranged for the modifications (Tr. 220-224). He also stated that the prosecutor and other government agents had approached him the previous evening and had threatened to prosecute him for perjury if he so testified. On cross-examination he admitted that defense counsel had authorized the prosecutor to interview him (Tr. 225-230).

1. Petitioner contends that, despite his failure to make a timely request for an accomplice instruction, the court's failure to so instruct the jury *sua sponte* was "plain error." Error of such magnitude has been found, however, only where the court has failed to give an accomplice instruction and accomplice testimony was the sole incriminating evidence adduced at trial, *United States* v. *Owens*, 460 F.2d 268 (C.A. 10), or where it was, in addition, "extremely unreliable, if not incredible and unsubstantial," *Tillery* v.

---

[1]Outstanding charges against Willis in this case were dismissed prior to trial on motion of the government (Tr. 174-175).

United States, 411 F.2d 644, 645 (C.A. 5). By contrast, no such error has occurred where, as here, despite the court's failure to give an accomplice instruction, accomplices "gave substantially the same, believable account of the group's activities in bringing marihuana into the United States from Mexico," *Davis* v. *United States*, 411 F.2d 1126, 1129 (C.A. 5), or where, as here, accomplice testimony was corroborated by other evidence, *United States* v. *Smith*, 459 F.2d 12 (C.A. 4); *United States* v. *Holt*, 427 F.2d 1114 (C.A. 8); *DeCarlo* v. *United States*, 422 F.2d 237 (C.A. 9); *United States* v. *Leonard*, 494 F.2d 955 (C.A.D.C.).[2]

The testimony of petitioner's accomplices in this case was not "incredible or otherwise unsubstantial." Jones and Palmer gave substantially the same detailed account of the smuggling operation and of the circumstances surrounding petitioner's involvement in the plan. Moreover, their testimony was corroborated by the testimony of other witnesses. Martin, who rented the camper used in the smuggling operation, testified to petitioner's arrangements for the rental and his subsequent interest in reclaiming the camper temporarily to repair a "window problem." In addition, defense witness Johnson, who modified the camper, corroborated the two accomplices' testimony in all respects but for the identity of the person who contacted him to build the compartment.

Moreover, while the trial court did not provide a complete accomplice instruction, it did caution the jury that it should (Tr. 311-312):

---

[2]*United States* v. *Evans*, 398 F.2d 159 (C.A. 3); and *McMillen* v. *United States*, 386 F.2d 29 (C.A. 1), certiorari denied, 390 U.S. 1031, cited by petitioner (Pet. 12), are inapposite. In those cases the failure to give an accomplice instruction was held reversible error since the court improperly charged the jury that it should presume a witness to be telling the truth.

carefully scrutinize the testimony given, the circumstances under which each witness has testified and *every matter in evidence which tends to indicate whether the witness is worthy of belief.*

Consider each witness' intelligence, motive and state of mind, his manner and demeanor on the witness stand. *Consider also any relation which each witness may bear to either side of the case, the manner in which each witness might be affected by your verdict*, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case. [Emphasis supplied.]

2. Petitioner also contends that prosecutorial intimidation of defense witnesses was prejudicial. The record reveals, however, that defense witness Jenkins, allegedly intimidated by the government into not providing certain exculpatory testimony, expressly denied having been threatened, intimidated, or promised anything by the government (Tr. 244, 246, 251). And defense witness Johnson, while stating that he had been "intimidated" by the prosecutor's threat of a perjury prosecution (Tr. 229), nevertheless freely offered testimony that tended to exculpate petitioner.[3]

In any event, we submit that prosecutorial conduct was not "so prejudicial as to deprive petitioner of a fair trial." *N. Y. Central R. R. Co.* v. *Johnson*, 279 U.S. 310, 316. "[W]hether improper conduct of Government counsel amounts to prejudicial error depends, in good part, on the

---

[3]The trial court rebuked the prosecutor for having threatened Johnson with a perjury prosecution (Tr. 230) but declined to grant a mistrial.

relative strength of the Government's evidence of guilt." *Jones* v. *United States*, 338 F.2d 553, 554, n. 3 (C.A.D.C.); *Berger* v. *United States*, 295 U.S. 78, 89. Here, where the evidence tending to show petitioner's guilt was credible and substantial and where there was no misconduct leading to an actual failure to obtain favorable testimony, any misconduct was harmless.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.